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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

CITY OF MILWAUKEE, et al.,

Petitioners,

v

STATE OF ILLINOIS, et al.,

Respondents.

BRIEF OF RESPONDENT STATE OF MICHIGAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Opinions Below, Jurisdiction, and Statutory Provisions Involved sections of the Petition are satisfactory to the Respondent, People of the State of Michigan.

QUESTIONS PRESENTED

I.

DOES THE DECISION OF THE COURT OF APPEALS, WHICH RECOGNIZES ACTIONS BY STATES TO ABATE INTERSTATE WATER POLLUTION PROBLEMS UNDER THE FEDERAL COMMON LAW OF NUISANCE, CONFLICT WITH DECISIONS ON THE SAME MATTER BY OTHER COURTS OF APPEALS OR THE SUPREME COURT?

II.

HAS THE COURT OF APPEALS' DECISION RECOGNIZING ACTIONS BY STATES UNDER THE FEDERAL COMMON LAW OF NUISANCE TO ABATE INTERSTATE WATER POLLUTION RAISED ISSUES OF SUFFICIENT IMPORTANCE THAT THIS COURT SHOULD GRANT CERTIORARI?

III.

IS THE STANDARD OF PROOF WHICH WAS APPLIED BY THE TRIAL COURT AND AFFIRMED BY THE COURT OF APPEALS IN CONFLICT WITH PRIOR PRECEDENT OF THIS COURT?

STATEMENT OF THE CASE

Petitioners' statement of the case is unacceptable because portions of it inaccurately reflect the content of the record established in the Trial Court and affirmed by the Court of Appeals. Careful review of the particular facts of this case is important because of the unique ecological problems caused by Milwaukee's pollution of Lake Michigan.

Petitioners, on page 10, inaccurately characterize the nature of the evidence before the Trial Court by stating "(the Plaintiffs' experts being limited to theories and the Defendants' witnesses reviewing actual tests performed by them as well as the applicable scientific theories)". In support of Respondent State of Michigan's claim that Milwaukee's discharges of excessive concentrations and quantities of the nutrient phosphorus was contributing to "accelerated eutrophication" of Lake Michigan expert witnesses presented considerable evidence in the form of testimony and studies. This evidence was carefully reviewed and relied upon by the Seventh Circuit in

support of its affirmance of the Trial Court findings. Reference to this evidence is found in Appendix pages B-26, and B-27.

Obviously, the record does not include proof that Lake Michigan is now in a eutrophic state. What it did show is that the conditions demonstrating the existence of "accelerated or cultural eutrophication" are present. Included in these conditions are the excessive phosphorus discharges by Petitioners, changes in types and quantities of biological organisms and increase in taste and odor problems in drinking water. Under Petitioners' apparent theory, in order to garner the empirical and demonstrative evidence to prove a nuisance it would be necessary to wait until the lake has suffered severe and irreparable pollution, i.e. eutrophication. Clearly such specious reasoning must fall of its own weight. The Courts below had before them numerous actual studies at various locations in the Great Lakes showing changes in the water related to nutrient inputs. The record also clearly showed that Milwaukee was the source of substantial nutrient input into Lake Michigan. Petitioners' argument that Respondents relied only upon theories is inaccurate.

Moreover, Petitioners make no mention that the Trial Court emphatically rejected their "actual tests" and their supporting theories as being inadequate and improperly conducted. In fact, regarding the Envirex studies presented by Petitioners the Trial Court ruled that it could attach almost no weight to these studies. (Appendix pages F-8 and F-9)

Petitioners, on page 11 set forth the proposition that the Trial Court improperly considered the highly technical matters presented in this lawsuit. Instead, Petitioners would have had the Court defer to the "expertise of the administrative body set up by Congress to deal with this subject", i.e., the United States Environmental Protection Agency (USEPA). Yet interestingly enough, at no point during the pendency of this

action did this "expert administrative body" take an active role in presenting their position or expertise to the Court. In fact, the USEPA's sole activity in the proceeding was highly improper *ex parte* correspondence with the Court following the conclusion of the trial and prior to the entry of the judgment order. The USEPA manner of presenting "expertise" in the matter was roundly chastized by the Court.

In the last paragraph of page 15 Petitioners represent to this Court that the Trial Court considered all the expert witnesses presented as nearly equal. This could not be further from the actual state of the record. While the Trial Judge did state that all of the witnesses were interested in the outcome of the case he specifically ruled that such circumstances standing alone did not make the witnesses biased in any individual sense. The Court stated "I have found some witnesses in this case who, despite their obvious commitment to particular points of view, are in my opinion honest, forthright, reasonably objective and who, in my opinion, made a genuine effort to be helpful to me in the resolution of these difficult problems." The Trial Court then went to particular length to specify and evaluate the witnesses in accordance with their competence and their credibility (F-5 and F-6). Moreover, the Trial Court went to even more detail in criticizing the studies and their presentation by Milwaukee's experts. (F-8 and F-9).

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS WHICH RECOGNIZES FEDERAL COMMON LAW OF NUISANCE ACTIONS BY STATES FOR INTERSTATE WATER POLLUTION PROBLEMS DOES NOT CONFLICT WITH ANY DECISIONS ON THE SAME MATTER BY THIS COURT OR ANY OF THE COURTS OF APPEALS.

Supreme Court Rule 19 indicates the character of the reasons which the Court will consider in granting certiorari. Two such indicators are decisions of a Court of Appeals which are in conflict with the decision of another Court of Appeals on the same matter. Important too, is a Court of Appeals decision which has decided a federal question in conflict with applicable decisions of this Court. Neither of these situations apply to the decision at issue in his Petition.

Petitioners do not point to a single case of this Court or of the Court of Appeals which conflicts with this decision. This is not surprising since the Seventh Circuit's decision represents a thoughtful and considered accommodation of statutory and judicial procedures for dealing with the problem of interstate water pollution.

The Court of Appeals correctly recognized the intent of Congress expressed in the Federal Water Pollution Control Act (FWPCA) as amended 33 USC § 1251 *et seq*, that common law rights and remedies continue to be available in specific cases. The right of states to establish and enforce more stringent limits on water pollution is clearly preserved in Section 510. The preservation of common law rights and remedies are preserved by Section 505(e). This analysis does not conflict with any cases.

Petitioners claim that the instant case provides an opportunity for this Court to redefine the scope of its 1972 *Illinois* v *Milwaukee* decision in light of the FWPCA, amendments of 1972 and 1977. In fact, there is nothing to redefine because the Court of Appeals decision recognizes the obvious relationship between the legislative and judicial functions with respect to interstate water pollution abatement problems. Here we have a clear accommodation of the broad and general legislative outline for dealing with such problems with specified minimum levels of pollution control. Additionally, there is

recognition of traditional equitable principles inherent in the judicial process which may be applied to specific factual circumstances where the general limits are inadequate.

Unable to find conflict with other cases, either in the Supreme Court or the Court of Appeals, Petitioners claim that a conflict exists between the Court of Appeals decision and the FWPCA. Such claims do not stand up under even the most cursory inspection. As just indicated, the Court of Appeals decision recognizes the proper sphere of legislative actions with respect to water pollution control and further recognizes the common law rights and remedies preserved by the FWPCA. Congress preserved common law rights and remedies with respect to water pollution abatement problems and Petitioners' arguments all would have been more appropriately given before the Congressional committees which structured the legislation.

It is interesting to note that Petitioners refer to Section 505(e) which provides for citizen suits while ignoring Sections 510 and 511 which the Court of Appeals decided were crucial to its analysis of the accommodation of common law and statutory remedies. Clearly, Petitioners' rather tenuous arguments do not withstand the proper analysis of all pertinent sections of the FWPCA.

Petitioners' arguments suggest that they are not pleased with the accommodation of parallel statutory and judicial procedures. But that framework was fashioned by Congress. What Petitioners ask is not that this Court review the decision of the Court of Appeals but, in effect that this Court review and overrule that which Congress has specifically recognized and preserved.

II.

THE COURT OF APPEALS DECISION RECOGNIZING FEDERAL COMMON LAW ACTIONS BY STATES FOR INTERSTATE WATER POLLUTION PROBLEMS FAILS TO RAISE ISSUES OF SUFFICIENT IMPORTANCE TO JUSTIFY THIS COURT'S GRANT OF CERTIORARI.

Petitioners raise the spectre of some 1300 municipalities nation wide being faced with financially burdensome pollution abatement requirements as the result of the Court of Appeals decision. Closer examination dispels the phantom. Even Petitioners seemingly agree that common law actions are preserved in Section 505(e) of the FWPCA. (Petition page 27). Sections 510 and 511 do make it clear that the States and the Court by implication are free to prescribe more stringent limits than those provided for in the FWPCA. Once that premise is established litigation such as the case at bar must be dealt with on the basis of its own particular factual circumstances.

When the requisite facts exist to establish a particular interstate water pollution problem which the statutory procedure is inadequate to handle there is a basis for common law action. They would be the exceptional case. There certainly has been no evidence of a rush of such common law actions.

Viewed in this light Petitioners in essence ask this Court to review this decision on its own factual and legal merits. This Court has usually denied certiorari when review is sought of a lower court decision which turns solely on an analysis of the particular facts involved. *United States* v *Johnston*. 268 US 220 (1925). The instant case fits this category. The Court has been even more reluctant to review factual issues where the findings of fact made by the District Court receive the concurrence of the Court of Appeals, *Graver Manufacturing Company* v *Linde Company*, 336 US 271 (1949).

III.

THE STANDARD OF PROOF AS APPLIED BY THE TRIAL COURT AND AFFIRMED BY THE COURT OF APPEALS DOES NOT CONFLICT WITH PRIOR DECISIONS BY THIS COURT.

Petitioners claim that the standard of proof utilized by the Trial Court and affirmed by the Court of Appeals in this case is in conflict with prior decisions of this Court. Petitioners refer to the prior Supreme Court cases, *Missouri* v *Illinois*, 180 US 208, 200 US 496 (1901, 1906); *New York* v *New Jersey*, 256 US 296 (1921). Both of those cases, controversies between states heard under the original jurisdiction of this Court, set the standard of proof to be clear and convincing evidence. However, in cases where this Court has exercised its original jurisdiction in interstate pollution cases it has applied a preponderance of the evidence standard when the defendant is a private party. *Georgia* v *Tennessee Copper*, 206 US 230 (1907).

Here the action was brought against a political subdivision of a state. Such political subdivisions are not "states" as used in 28 USC § 1251(a)(1). On the other hand the cases cited by Petitioners and mentioned above involve controversies between states. Thus the clear and convincing standard of proof required in those cases involving controversies between states is inapplicable here.

Thus, Petitioners' specious claim of conflict with other decisions of this Court presented in this portion of the Petition devolve in actuality to no more than argument about the particular facts of the case. As noted earlier this Court is not inclined to grant certiorari based solely on disputes as to the particular facts of the case, particularly when both the Trial Court and the Court of Appeals have agreed upon those particular factual circumstances.

SUMMARY

Respondent People of the State of Michigan submit that the Writ of Certiorari should be denied for the following reasons:

1. The decision of the Court of Appeals that federal common law rights and remedies for interstate pollution are preserved does not conflict with decisions of this Court or any Courts of Appeals.

2. The recognition by the Court of Appeals of federal common law rights and remedies for interstate water pollution problems lacks sufficient and imperative questions of public importance to justify jurisdiction of this Court.

3. There is no conflict on the matter of standard of proof between the Court of Appeals and decisions of this Court.

Respectfully submitted,

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